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Court of Appeals
Division III
State of Washington

NO. 34569-6

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

LYNN BREWER and DOUGLAS BREWER, a married couple,

Appellants,

v.

LAKE EASTON ESTATES HOMEOWNERS ASSOCIATION, a Washington corporation; and MICHAEL D. PECKMAN, an individual,

Respondents.

BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

WASHINGTON STATUTES

WASHINGTON RULES AND REGULATIONS

TABLE OF AUTHORITIES

I. INTRODUCTION

Appellants Lynn and Douglas Brewer (the "Brewers") filed this lawsuit against Respondents Lake Easton Estates Homeowners Association and Michael D. Peckman (collectively "LEEHOA") alleging various causes of action, but specifically seeking a determination by the court that for the past 17 plus years, it has been improper for LEEHOA to manage the network of nine wells that serve the Lake Easton Estates community (collectively "Water Systems").

Thirteen years ago, the Brewers purchased property in Lake Easton Estates (the "Development"). A well provides water to the Brewers' property, Well I. The wellhead for Well I is located on the Brewers' property, and serves and is owned equally by six lots, including the Brewers. When the Brewers purchased their property, they were made aware of the: (1) "Declaration of Covenants, Conditions & Restrictions of Lake Easton Estates Amended September 15, 1992" ("1992 CC&Rs"), (2) the "Lake Easton Estates Domestic Water System Agreement" dated February 6, 1990 ("1990 Water Agreement") and (3) the 1995 Water User's Declaration and the amendment thereto (collectively "1995 WUD") that were recorded on their property title. (Appellants' Brief ("AB") at 5, 8; and CP 732 at #11-12, CP 733 at #14.) Pursuant to the 1992 CC&Rs, the 1990 Water Agreement, the 1995 WUD[1] and LEEHOA's By-Laws,

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[1] The 1995 WUD provides that the owners of Well I can select a well manager. Until 2012, all owners of Well I desired LEEHOA to manage Well I.

LEEHOA has managed the Water Systems for all of its lot owners – and did so without complaint – for at least 11 years.

The Brewers initiated this lawsuit in 2013 – almost *ten years* after they bought their property – after Kittitas County denied them a variance to build a garage within the 100' well protection zone ("100' setback") located on their property. The Brewers' amended complaint filed in 2015 alleged seven causes of action arising out of LEEHOA's management of the Water Systems, the collection costs for those systems, and for not enforcing the 100' setback from eight of the nine wellheads in the Water Systems (Well I has not been encroached upon by any lot owner).

The parties cross-moved for summary judgment, and the trial court properly ruled, *inter alia*, that LEEHOA had authority to manage the Water Systems which included Well I and dismissed the Brewers' causes of action of negligence, nuisance, and conversion. These are the only issues on appeal by the Brewers.

II. ISSUES PRESENTED FOR REVIEW

1. Whether the trial court properly ruled that LEEHOA had the authority to manage Well I when that authority is permitted by RCW 64.38.010(11), *Halme v. Walsh,* the 1992 CC&Rs, the 1995 WUD, and LEEHOA's By-Laws; and the Brewers are now estopped from challenging LEEHOA's authority to manage the Water Systems.

2. Whether the trial court properly ruled that the 1992 CC&Rs are a controlling instrument for management of the Water Systems.

3. Whether the trial court properly granted LEEHOA's motion for summary judgment dismissing the Brewers' claims for negligence, nuisance and conversion when there were no material questions of fact in dispute which provide any basis for those claims.

III. COUNTERSTATEMENT OF THE CASE

This Counterstatement is necessary because the Brewers' Statement of the Case (AB at 3-11) is factually inaccurate in many respects and fails to comply with RAP 10.3(a)(5) because it contains legal argument.[2]

A. Factual Background of the Development.

The Development sits within the Yakima River Basin and is served by a network of wells (also known as a Group B water system) for its water supply. (CP 1035 at ¶ 3.) There are a total of nine wells within the Development, each drawing groundwater for residential use by all lots associated with each particular well (*i.e.* the Water Systems). (*Id.*) The Brewers purchased their property (Lot 27) in the Development in 2004 and are members of LEEHOA. (CP 1035 at ¶ 2, *see also* CP 1117-18.)

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2 LEEHOA already moved to strike the Brewers' brief once for failure to comply with the RAP. The parties have now *twice* stipulated that the Brewers could file an amended brief that complied with the RAP. Despite this stipulation, the Brewers' *third* submission still fails to comply.

B. Timeline of the Development.

In 1989, Hadley D. Hackey purchased and subdivided property to create the Development. (CP 1035 at ¶ 4.) The face of the plat contains the initial restrictive covenants for the Development. (*Id.*, ¶ 4, *see also* CP 1052.) On or about January 30, 1990, Mr. Hackney sold the Development to Reflection Lake, Inc., a Washington corporation. (CP 1035 at ¶ 5.) The initial restrictive covenants were superseded in their entirety by a "Declaration of Covenants, Conditions and Restrictions for Lake Easton Estates" dated August 23, 1990 ("1990 CC&Rs"). (CP 1035 at ¶ 7, *see also* CP 1060-74.) The 1990 CC&Rs authorized creation of a homeowners' association and designated each lot owner as a member, allocating one vote to each lot. (*Id.*)

On February 6, 1990, a document entitled "Lake Easton Estates Domestic Water System Agreement" was executed and recorded ("1990 Water Agreement"). (CP 1035 at ¶ 6, *see also* CP 1056-58.) That document referenced six wells, including the well serving the Brewers' property (Well I), and provided that the lot owners could create an owners' association "for the purpose of overseeing the operation, maintenance and repair of each individual domestic water system." (CP 1057.)

The 1990 CC&Rs were superseded in their entirety by "Amended Declaration of Covenants, Conditions and Restrictions of Lake Easton Estates" executed on March 19, 1992 ("March 1992 CC&Rs"). (CP 1036 at ¶ 9, *see also* CP 1078-87.) The March 1992 CC&Rs were then

superseded in their entirety by "Declaration of Covenants, Conditions and Restrictions of Lake Easton Estates Amended September 15, 1992" (*i.e.* the 1992 CC&Rs). (CP 1036 at ¶ 10, *see also* CP 1089-98.) Under the 1992 CC&Rs, LEEHOA was authorized to collect assessments to "promote the recreation, *health, safety and welfare* of the Owners, and to pay costs associated with any signage, landscaping, lighting ***and water*** thereof." (CP 1091 at ¶ 3.2 (emphasis added).) The 1992 CC&Rs also provided that:

> The Declarant, its successors and assigns, including all Lot Owners, will not construct, maintain or suffer to be constructed or maintained upon the Properties, or any Lot, and within one hundred feet (100') of any well herein described, so long as the same is operated to furnish water for public consumption, *any potential source of contamination*, such as cesspools, sewers, privies, septic tanks, drainfields, manure piles, garbage of any kind or description, barns, chicken houses, rabbit hutches, pigpens, or other enclosures or structures for the keeping or maintenance of fowls or animals, or storage of liquid or dry chemicals, herbicides or insecticides.

(CP 1096 at ¶ 6.3 (emphasis added).) Further, Section 6.3 provided that the operation of the waterworks supplying water would devolve to LEEHOA and that "[t]hese covenants shall run with the land and survive the otherwise termination of this Amended Declaration." (*Id.*)

In 1994, Beaconsfield Associates bought the majority of the Development. (CP 1036 at ¶ 12.) On December 19, 1994, Beaconsfield Associates executed nine separate Water User's Declarations (collectively

the "1995 WUDs[3]") containing identical provisions and establishing that each parcel in the Development had an appurtenant shared interest in a corresponding well and to the use of the Water Systems. (CP 1037 at ¶ 13, *see also* CP 1103-09.) None of the 1995 WUDs superseded the 1990 Water Agreement, rather they were in addition to the 1990 Water Agreement. The 1995 WUDs provided that "the water system and water system bank account shall be managed by such of the parties as the parties who own the property hereinabove described mutually agree upon." (CP 1107 at ¶ 9.) The 1995 WUDs also provided that if a party is in breach of the agreement, the defaulting party may have their service disconnected upon ten days written notice. (CP 1108 at ¶ 11.) As the Brewers correctly point out in their Amended Complaint and Brief, LEEHOA is *not* a party to any of the 1995 WUDs and does not hold any ownership interest in any of the wells or Water Systems, including Well I. (CP 6 at ¶ 32, *see also* CP 1038 at ¶ 18.)

The 1992 CC&Rs were amended several times, including an "Amendment to Declaration of Covenants, Conditions and Restrictions of

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[3] For the sake of clarity, these will be referred to as the "1995 WUDs". Although the WUDs were signed in 1994, they were not recorded with the Kittitas County Auditor until 1995, and the Brewers refer to these as the "1995 WUDs" in their briefing.

Lake Easton Estates Dated March 30, 1995." (CP 1037 at ¶ 14, *see also* CP 1111-12.)[4]

The current Association was incorporated in June 2000 by the lot owners in the Development – not just by a select few as alleged in the Brewers' brief. (CP 1034 at ¶ 2, *see also* CP 1046) After LEEHOA was organized in 2000, and pursuant to the 1990 Water Agreement and the 1995 WUDs, the lot owners agreed at Annual Meetings that LEEHOA should manage the Water Systems. (CP 1038 at ¶ 18.)

The By-Laws adopted by the Board, and signed by the nine Board members in 2001 on behalf of all lot owners, specifically provided that "[t]he Board of Trustees shall appoint a Water Master to manage the water (*sic*) Lake Easton Estates Domestic Water system." (CP 985 at § 4.6.) Each year since, a "Water Master" (or Well Master) has been appointed by the Board to oversee the operation, maintenance and repair of the Water System, as well as coordinate with a third-party to test and report water quality on an annual basis. (CP 1038 at ¶ 18.) Since 2001, the lot owners have approved annual budgets which include a line item for well maintenance, repair, water quality testing and electricity, which costs are shared equally among all LEEHOA lots. (CP 1038 at ¶ 19, *see also* CP

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[4] In 2012, a vote was taken to supersede the 1992 CC&Rs in their entirety with a new CC&R document (the "2012 CC&Rs"). As part of this lawsuit, the Brewers' moved for summary judgment against LEEHOA alleging the 2012 CC&Rs were invalid because the process used to adopt them was flawed. The trial court granted the Brewers' motion to invalidate the 2012 CC&Rs, which is not on appeal. (CP 937 at ¶ 4.)

1120-30, CP 1132-83.) While the Brewers claim that none of the LEEHOA board meetings have ever been "open for observation by all owners of record and their agents", (AB at 8) the Brewers are unable to cite to any evidence to support that claim.

The results of water quality tests have been reported by the Water Master to the lot owners on an annual basis at Annual Meetings starting in or about 2001. (CP 1038 at ¶ 20, *see also* CP 1132-83.) Water quality test results have also been reported annually to the Washington State Department of Health ("DOH"), and are available on the DOH website. (*Id.*, *see also* CP 998-1012.)[5] Prior to late 2012, when the Brewers and another LEEHOA lot owner Joseph Mallory (who also filed a related case) started to complain about LEEHOA's management of the Water Systems, no LEEHOA lot owner had ever challenged or complained of LEEHOA's authority to collect assessments or manage the Water Systems. (CP 1039 at ¶ 22.)

C. The Brewers' Property and Lawsuit Against LEEHOA.

The Brewers bought their property in the Development in 2004. (AB at 5, *see also* CP 1117.) Well I provides water to the Brewers' property. The wellhead for Well I is located on the Brewers' property,

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[5] Prior to 2015, the Water Facilities Inventory reports automatically generated from the DOH website for the Water Systems identified LEEHOA as the owner of the nine Water Systems, but there is no evidence LEEHOA ever "registered" itself as the owner of any of the Water Systems and there is no evidence LEEHOA has ever tried to establish legal ownership of any of the Water Systems. LEEHOA requested DOH correct its database error in 2015. (CP 321-442.)

and serves and is owned equally by six lots, including the Brewers. The Brewers acknowledge when they purchased their property in 2004, they received a title report that identified the 1995 WUD and the "1992 CC&Rs which are recorded on the title of all parcels in Lake Easton Estates and bind the community at large". (AB at 19.) Up until this lawsuit was filed in 2013, the Brewers had not challenged or complained of LEEHOA's right to manage the Water Systems. In fact, appellant Doug Brewer acknowledged the managerial role of LEEHOA when he sought out help from the Well Master in 2009. (CP 1163 at ¶ V.) And appellant Lynn Brewer acknowledged LEEHOA's legitimate managerial role by offering to research the possibility of a tax write off for a LEEHOA-funded capital expenditure for the Water Systems. (CP 1151 at ¶ 4.)

LEEHOA has satisfied its obligations in ensuring the Water Systems satisfy all health and safety requirements. Despite the Brewers' allegation that LEEHOA has neglected to test Well I (AB at 20), Well I has indeed been tested as evidenced by the well identification number noted on the test results, Id# 02260X, the identification number confirmed by the Brewers as the well on their property in their Amended Complaint. (CP 2 at ¶ 2). Well I has passed water quality tests every year for the past fifteen years; there is no indication of any contamination. (CP 998-1012.)

D. Procedural History.

In August 2015, LEEHOA filed a motion for summary judgment to dismiss all of Brewers' causes of action. The trial court granted

LEEHOA's motion for summary judgment, dismissing, *inter alia*, the Brewers' claims for negligence, nuisance and conversion, which are the subject of this appeal.

The Brewers also filed two motions for partial summary judgment: one to invalidate the 2012 CC&Rs and the other to declare the 1995 WUD as the valid deed to the Brewers' well, Well I.

The trial court granted the Brewers' motion for partial summary judgment to invalidate the 2012 CC&Rs, which is not on appeal. The trial court denied in part the Brewers' motion for partial summary judgment to validate the 1995 WUD as the valid deed to the Brewers' well (Well I), which the Brewers are appealing here.

The trial court heard oral argument on December 21, 2015 and ruled – on the relevant issues – as follows:

> 5. As to the right to manage the Water System serving Plaintiffs' property ("Well I"), the January 1995 Water Use (*sic*) Declaration recorded January 27, 1995 under recording number 578783 ("1005 (*sic*) WUD") is effective but is not the controlling instrument on the issue of the management of the water system serving the Brewer property. The Lake Easton Estates Homeowners' Association (LEEHOA) lacks standing to challenge the WUD as it is not a party to it.
>
> 6. The 1995 WUD co-exists with the 1992 CCRs and will co-exist with any properly recorded future CCRs.
>
> 7. The 1992 CCRs authorize the existing homeowners' Association or its successor to levy assessments to promote the health, safety and welfare of the association and to pay the costs associated with any signage, landscaping, lighting and water thereof.

8. The owners of the lots served by the well serving the Plaintiffs' property have never taken any steps under the 1995 WUD to manage that well themselves. If all owners of the well agree to do so, they have that right, but they have never exercised it. LEEHOA then had the right, if not the obligation, to step in and manage the water system associated with that well. The 1992 CCRs provided for it. It is not the fault of LEEHOA that the owners of the well never stepped up and managed the water system served by that well.

9. The 2001 By-laws specifically provide that LEEHOA shall appoint a Well Master. Not once since had any group of well owners within the development asked to appoint their own well manager. Plaintiffs may have done so individually, but that is not effective as the 1995 WUDs require mutual assent to manage the water system serving their lots. Mutual assent means all the owners must agree.

10. Unless the enforceability of the 1995 WUD governing the water system is successfully challenged by an owner of that water system, at such time as any well system owners mutually agree to another manager for their well system other than LEEHOA, all future assessments for said well system, including, but not limited to, the costs related to the acquisition, installation and maintenance of meters, shall be governed by the WUD and the well owners shall not be subject to assessments for any other well system, but this ruling does not effect assessments for non water system management one way or another.

11. The Plaintiffs bought their property in August of 2004 and the 1995 WUD was listed as an easement on their title report. They have therefore been on notice of the 1995 WUDs since that time.

12. Plaintiffs' Motion for Summary Judgment that LEEHOA has no authority to manage the well serving heir property is therefore denied. The owners of that well never exercised their right under the WUDs to

manage the well themselves and LEEHOA had the right, if not the obligation, to do so under the 1992 CCRs.

13. Therefore, LEEHOA does not owe any money to the Brewers. To the contrary, under the 1992 CCRs, LEEHOA has the authority to levy assessments for the management for the water systems and to file liens for the non-payment of those assessments. Further, LEEHOA has the authority to split the cost of managing the water systems equally among all owners as the only restriction on doing so is in the WUDS and LEEHOA is not a party to, and therefore not bound by, those WUDS.

14. Defendants' Motion for Summary Judgment to dismiss the Conversion claim is granted. There are no material questions of fact in dispute. Under the 1992 CCRs, LEEHOA has the authority to collect assessments to manage the water systems and to file liens for non-payment of those assessments.

15. Defendants' Motion for Summary Judgment to dismiss the claim of violation of RCW 64.38, negligence and declaratory relief regarding the 100' setback is granted. There are no material questions of fact in dispute. With respect to the claims that LEEHOA should have enforced a 100' building set back from the wells, there is no requirement that LEEHOA do so. The 1992 CCRs only require buildings that are a source of contamination not be built within a 100' of the wells. There is no evidence, and no inference from any evidence, that any building within 100 feet of the Brewer well, or any well within the development for that matter, is a source of contamination. The 1995 WUD has a stronger prohibition, but LEEHOA is not a party to that WUD and therefore is not required to abide by it. Further, the 1992 CCRs require owners to comply with building codes. It is therefore reasonable for LEEHOA to rely on the County to enforce those building codes and to enforce any set back requirements that may be in effect. Further, WAC 246-291, which

sets forth the requirements for building within a sanitary control, has exceptions. There has been no evidence submitted that those exceptions did not apply to those structures built within 100' of the wellheads. There are no material questions of fact in dispute that the LEEHOA Board acted with an appropriate degree of care with respect to the allegations raised against it.

16. Defendants' Motion for Summary Judgment to dismiss the nuisance claim is granted for the same reasons as those outlined in the prior paragraph. Further, there is no evidence in the record that plaintiffs' property value has been impacted by any action, or inaction, on the part of LEEHOA.

(CP 937-40.)

IV. ARGUMENT

A. Standard of Review.

A court reviews a grant of summary judgment *de novo*, engaging in the same inquiry as the trial court. *Lallas v. Skagit County*, 167 Wn.2d 861, 864, 225 P.3d 910 (2009); *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). *Tracfone Wireless, Inc. v. Dep't of Revenue*, 170 Wn.2d 273, 280-81, 242 P.3d 810 (2010). An order granting summary judgment can be affirmed on any basis supported by the record. *Redding v. Virginia Mason Med. Ctr.*, 75 Wn. App. 424, 426, 878 P.2d 483 (1994).

B. The Trial Court Did Not Err in Granting LEEHOA Authority to Manage the Brewers' Well.

The Brewers first assign error to the trial court's ruling that LEEHOA had authority to manage Well I. The Brewers argue on appeal that LEEHOA does not qualify as a lawful homeowners' association under RCW 64.38.010(11), as affirmed by *Halme v. Walsh.* This argument was raised by the Brewers for the first time in their motion for reconsideration.

The definition of homeowners' association provides as follows:

> (11) "Homeowners' association" or "association" means a corporation, unincorporated association, or other legal entity, each member of which is an owner of residential real property located within the association's jurisdiction, as described in the governing documents, and by virtue of membership or ownership of property is obligated to pay real property taxes, insurance premiums, maintenance costs, or for improvement of real property other than that which is owned by the member.

RCW 64.38.010(11). The court in *Halme* stated that this definition contains three separate requirements. *Halme*, 192 Wn. App. 893, 902, 370 P.3d 42 (2016).

> (1) there must be "a corporation, unincorporated association, or other legal entity," (2) each member of the entity must be an owner of residential real property within the entity's jurisdiction as described in its governing documents, and (3) members must be obligated to "pay real property taxes, insurance premiums, maintenance costs, or for improvement of real property" that the member does not own. RCW 64.38.010(11).

Id.

In the Brewers' motion for reconsideration,[6] the Brewers *only* argued that LEEHOA does not own any real property and therefore could not qualify as a homeowners' association under RCW 64.38.010(11). After considering the briefing submitted by both parties, the trial court denied the Brewers' motion for reconsideration.

Now, for the first time on appeal, the Brewers argue LEEHOA does not meet any of the *three* required elements that must be present in order to qualify as a valid homeowners' association under RCW 64.38.010(11). The Brewers' claim that LEEHOA does not meet the first and second elements should not be considered because appellate courts will not entertain issues raised for the first time on appeal, *see* RAP 2.5(a); *Brundridge v. Fluor Fed. Servs., Inc.*, 164 Wn.2d 432, 441, 191 P.3d 879 (2008), and because the Brewers are unable to cite to any clerk's papers in support of these arguments.

Nevertheless, even if this court considers these additional arguments, LEEHOA *does* qualify as a homeowners' association under RCW 64.38.010(11). The first element of the Homeowners' Association Act (the "1995 HOA Act") requires that the association be incorporated, which the Brewers admit occurred in 2000. (CP 6 at ¶ 26.) The Brewers write "*At the time of LEEHOA's incorporation in 2000*, LEEHOA did not

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[6] The Brewers argued in their motion for reconsideration that in light of the new case law, *Halme*, the trial court should reconsider all elements of its ruling that violate Chap. 64.28 RCW (the 1995 HOA Act). However, *Halme* did not change existing law, rather it reaffirmed the elements required in RCW 64.38.010(11).

actually meet a single one of the three required elements to be a lawful homeowners association under the 1995 HOA Act as set forth in RCW 64.38.010(11)." (AB at 13, emphasis added.) The Brewers also plead in both their original and amended Complaints that LEEHOA "is and was at all times relevant to this complaint, a non-profit corporation organized and existing under the laws of Washington." (CP 2 at ¶ 4). Since the 1995 HOA Act had been in existence for eighteen years prior to the filing of the Brewers' original complaint, the requirements for homeowners' associations organized under the law of Washington were known to the Brewers when they made the allegation in their Complaint. The Brewers also acknowledge that the 1992 CC&Rs referred to an association – but summarily claim – without any citation to the record – that there is no evidence any homeowners' association was formed. (AB at 5-6.)

Second, the Brewers contend that LEEHOA does not qualify as a homeowners' association because one of the incorporators of LEEHOA did not own real property in the Development. (AB at 7.) Yet again the Brewers do not cite any evidence in support of this contention. (*Id.*) An appellant has the "burden of providing an adequate record on appeal." *Story v. Shelter Bay Co.,* 52 Wn. App. 334, 345, 760 P.2d 368 (1988). "RAP 9.2 requires the party seeking review to provide an appeal record containing all evidence necessary and relevant to the issues to be reviewed." *Favors v. Matzke,* 53 Wn. App. 789, 794, 770 P.2d 686

(1989). Here, the Brewers are unable to establish that LEEHOA does not meet the second element of RCW 64.38.010(11).

Finally, the Brewers contend that LEEHOA does not qualify as a homeowners' association because LEEHOA itself must own real property in its name. (AB at 7.) This argument lacks merit because RCW 64.38.0101(11) does *not* require a homeowners' association to own real property. The statute in fact states that "members must be obligated to 'pay real property taxes, insurance premiums, maintenance costs, or for improvement of real property' that the member does not own." RCW 64.38.0101(11). Indeed, here LEEHOA members pay the costs of D & O insurance, liability insurance, and maintenance costs associated with the operation of LEEHOA. (CP 1038, 1120-1130).

Statutory construction begins by reading the text of the statute or statutes involved. *State v. Roggenkamp*, 153 Wn.2d 614, 621, 106 P.3d 196 (2005). If the language is unambiguous, a reviewing court is to rely solely on the statutory language. *State v. Avery*, 103 Wn. App. 527, 532, 13 P.3d 226 (2000).

The last provision is not ambiguous, so this court may only rely on the statutory language in determining the legislature's intent. RCW 64.38.010(11) does *not* require a homeowners' association to own real property. The statute simply states that by virtue of membership *or* ownership of property, the homeowners' association is responsible for managing property other than that which is owned by the member. If the real property is owned by multiple members, then by virtue of

membership, the homeowners' association is responsible for managing that property.

Indeed, *Halme* supports this reading of the statute. In *Halme*, the Walshes, the Hasselbachs, and Halme all owned lots in an area comprising nine lots known as Nosko Tract-Phase Two. 192 Wn. App. 893, 896, 370 P.3d 42 (2016). In 1990, the owners of all the lots signed a Road Maintenance and Use Agreement ("RMA") to build and maintain a private road servicing the lots. *Id.* The RMA required lot owners to make an annual payment to a road maintenance fund. *Id.* The Walshes and the Hasselbachs claimed the RMA resulted in the formation of a homeowners' association when Chap. 64.38 RCW became effective in 1995. *Id.* at 900.

The homeowners' association in *Halme* did not own the real property that was subject to the RMA; rather, the property was owned by all the three landowners that made up the homeowners' association. *Id.* at 898. Because all of the owners owned the property, not just one, "the parties to the HOA were obligated to pay maintenance costs on property they apparently did not own." *Id.* at 903. This is no different than the situation here. The Water Systems are managed by LEEHOA but are jointly owned by various groups of lot owners. The Brewers' interpretation of the statute does not comport with the language in Chap. 64.38 RCW or the facts in *Halme*. The Brewers interpretation of a homeowners' association would render many such associations in Washington invalid and would lead to an outpouring of litigation related to whether a homeowners' association exists under the statute.

C. LEEHOA Has Complied with its Own By-Laws.

The Brewers also argue that LEEHOA's own By-Laws limit its collection of assessments to "maintenance and administration of any and all [of the (*sic*)] properties owned or as may be acquired by the Homeowners Association." (AB at 16.) While this argument should not be considered because it is being raised for the first time on appeal and it requires this court to consider evidence not before the trial court (*see id.*), even if it is considered, the Brewers still fail to demonstrate how the By-Laws preclude LEEHOA from managing the Water Systems.

The By-Laws adopted by the Board in 2001 specifically provided that "[t]he Board of Trustees shall appoint a Water Master to manage the water (*sic*) Lake Easton Estates Domestic Water system." (CP 985 at § 4.6.) Each year since, a "Water Master" (or Well Master) has been appointed by the Board to oversee the operation, maintenance and repair of the Water Systems, as well as coordinate with a third-party to test and report water quality on an annual basis. (CP 1038 at ¶ 18.) Since 2001, the lot owners have approved annual budgets which include a line item for Water Systems maintenance, repair, water quality testing and electricity, which are shared equally among all LEEHOA lots. (CP 1038 at ¶ 19.)

The trial court correctly ruled that LEEHOA had a duty under its By-Laws and Articles of Incorporation to manage the Water Systems.

> They need to do what they need to do as their bylaws and articles of incorporation indicate they've got a duty to promote the community welfare to take care of things and that's what they did. They stepped in when the water wasn't taken care of and they assessed the assessments and

billed them the way in which they did and this Court finds they were entitled to do that. (CP 1842:13-17.)

From this Court's impression, they came in and took over. They had the responsibility to take over, quite frankly. Their bylaws, Article III, sets forth they have the responsibility to promote the community welfare of the owners of the lots and to do what is necessary to carry out the articles of incorporation. They're responsible for liabilities incurred by the Homeowners Association. Had they not stepped in and taken care of this water who would have I guess is the question that gets posed. Um, they come in . . . they collect assessments in doing this. And again, they . . . this Court finds they were entitled to do that and they are continued to be entitled to do that until a water systems group removes itself as they're entitled to do under the water user declarations. They, um, they're entitled to collect assessments to promote recreation, health, water, etcetera. I still find that that's all in place. And they are entitled to collect the assessments in the way that they have in terms of equal amounts from each lot because they are, again, not bound by the water user declarations. They're not a party to that so they can collect the assessments in the way that they need to.

(CP 1845:13-1846:3.)

LEEHOA disputes the Brewers' hyperbolic characterization of what might occur if a group of individuals could assert dominion and power over the management of private property simply by forming a homeowners' association when they did not like the actions of another. Here, all lot owners have agreed since at least 2001 to have LEEHOA manage the Water Systems, and there is a specific clause in the 1992 CC&Rs which allows it. The Brewers' contention that "there is no record that any more than a handful of homeowners in Lake Easton Estates agreed to be part of LEEHOA" is misleading. (AB at 17.) This is not

what occurred here. Per the appendix submitted by the Brewers, the By-Laws were only signed by nine lot owners – the original Board members – but that does not support their claim that only nine lot owners wanted to form LEEHOA. Indeed, the Brewers have not submitted any evidence that only a handful of lot owners in the Development agreed to be a part of LEEHOA, and since its formation, LEEHOA has acted in conformance with its By-Laws and Articles of Incorporation to promote the community welfare.

D. The Trial Court Correctly Held that the 1992 CC&Rs and the 1995 WUD Must be Read Together.

The Brewers argue that the 1995 WUD requires each lot owner to pay for their own water system in which they have a shared interest, and the lot owners cannot be responsible for privately-deeded water systems in which they have no right, title or interest in and receive no beneficial use. (AB at 19.) In support of this argument, the Brewers allege that the trial court stated that "well owners shall not be subject to assessments for any other well system". (AB at 20.) But this quote, reiterated several times in their brief, completely misstates the trial court's ruling. The trial court ruled that *if* the enforceability of the 1995 WUD is successfully challenged by an owner of the water system and/or all owners of that water system mutually agree to another manager for their water system, all future assessments for said water system shall be governed by the 1995 WUD and the well owners shall not be subject to assessments for any other water system. (CP 938 at ¶ 10.) But this has not occurred. Because the 1995

WUD has not been successfully challenged by an owner and the six owners of Well I have not agreed to a manager other than LEEHOA, the 1992 CC&Rs and the 1995 WUD allow for LEEHOA to manage Well I. (CP 937.)

The Brewers also argue that the trial court ruled the 1992 CC&Rs are paramount to the 1995 WUDs. (AB at 31.) But this, again, is false. The trial court ruled that the *1995 WUD co-exists with the 1992 CC&Rs* and will co-exist with any properly-executed and recorded future CC&Rs. (CP 937 at ¶ 6.) The trial court never ruled one was paramount to the other; rather, by co-existing, they have to be read in concert. The Brewers admit that in 2004, when they bought their property, there were two recorded instruments on title to the property: (1) the 1995 WUD, and (2) the 1992 CC&Rs. (AB at 4-5.) Despite this acknowledgment, the Brewers argue that nowhere in any of the 1995 WUDs is an association or LEEHOA mentioned. But this is irrelevant. The Brewers acknowledge receiving a copy of the 1992 CC&Rs, which governed LEEHOA, with their 2004 title report when they purchased their property. (CP at 5.) The trial court properly held that the 1992 CC&Rs and the 1995 WUD must be read together, so any ambiguity in the 1995 WUDs would be clarified by the 1992 CC&Rs, and vice-versa.

The Brewers' argument that LEEHOA has also failed to comply with the functional aspects the 1995 WUDs required in its management of the Water Systems is also contradicted by the record. LEEHOA has complied with the functional aspects of managing the Water Systems;

water quality tests have been taken and reported by the Water Master to the lot owners on an annual basis at Annual Meetings starting in or about 2001. (CP 1038 at ¶ 20, *see also* 1132-83.) Water quality test results were also reported to DOH annually. (CP 1038 at ¶ 20, *see also* CP 998-1012.) There is simply no evidence that LEEHOA has not complied with any of the 1995 WUD requirements.[7]

E. The Brewers are Estopped from Challenging LEEHOA's Authority to Manage Well I.

By allowing LEEHOA to manage Well I since they purchased their property in 2004, the Brewers are now estopped from challenging that authority. *See Ebel v. Fairwood Homeowners' Association*, 136 Wn. App. 787, 150 P.3d 1163 (2007). In *Ebel*, several property owners challenged the authority of their homeowners' association to enforce covenants, in part because it was not properly formed. *Id.* at 789. The trial court dismissed the complaint and the Court of Appeals affirmed. Although the court found that the association did have the authority to enforce the covenants and it was properly formed, it also held that the property owners ratified both the disputed covenants and the authority of the association to act and were therefore estopped from challenging them. *Id.* at 793-94. The owners had participated in the association in varying degrees, had

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[7] The Brewers may be basing this claim on the allegation that contamination was found in Well I. However, every test of Well I since 2002 has been negative. (CP 1011.)

paid dues for three years, and they were aware of the benefits being provided by the association. *Id.* at 794.

The same argument can be made here. The Water Systems must be managed, the well houses and equipment must be maintained, the water must be tested, water text results must be reported, power bills must be paid, and a reserve account maintained for emergencies. The lot owners have paid assessments for these operational costs since at least 2001. And the Brewers themselves have been part of this community during almost this entire period, having purchased their property in 2004. (CP 1117-18.) Notably, the lot owners, including the Brewers, have been relying on LEEHOA to manage the Water Systems for far longer than the three years in the *Ebel* case. The Brewers are estopped from now challenging LEEHOA's authority to manage the Water Systems and collecting assessments for the operational costs of the Water Systems.

The trial court correctly held that the 1992 CC&Rs, the 1995 WUDs, and the By-Laws, when read together, explicitly or implicitly, authorize LEEHOA to collect assessments to manage the Water Systems. The lot owners have consented to this arrangement of having one system manager control all of the Water Systems in the Development and in sharing the costs equally by approving the Annual Meeting minutes and annual budgets from 2002 to present day. To the extent the 1992 CC&Rs, the 1995 WUDs and the By-Laws, do not authorize LEEHOA to collect assessments to manage the Water Systems, the Brewers are now estopped from challenging LEEHOA's authority.

F. The Trial Court Did Not Err in Ruling that the 1992 CC&Rs are a Controlling Instrument for Management of the Nine Privately-Owned Wells in the Development.

Without additional factual support, but by labeling it a second assignment of error, the Brewers repeat their prior arguments: that the trial court erred in ruling that the 1992 CC&Rs are the controlling instrument for management of the Water Systems. The only additional issues to be analyzed are: (1) whether the Brewers have a cause of action if LEEHOA's alleged mismanagement of the Water Systems cause them harm, and (2) whether the Brewers can be bound to pay for assessments related to the other eight Water Systems when the Brewers do not have "equitable servitude" in any of the other eight Water Systems.

The Brewers' first argument – that they have no recourse against LEEHOA if mismanagement were to occur – is belied by its own complaint for damages. The Brewers sued LEEHOA under various causes of action, including negligence, nuisance, conversion and breach of fiduciary duty. These causes of action were properly dismissed, *see infra*, because the Brewers were unable to prove any of the harms alleged, not because LEEHOA is immune from liability. This argument does not support the Brewers' claim that the trial court erred in ruling that the 1992 CC&Rs are the controlling instrument for management of the Water Systems.

The Brewers' second argument – that the Brewers cannot be bound to pay for assessments related to the other eight Water Systems when the Brewers do not have "equitable servitude" in any of the other eight Water

Systems – fails to consider how the 1992 CC&Rs, the 1995 WUDs, and the By-Laws require all lot owners to be responsible for assessments related to the Water Systems. The 1992 CC&Rs and the 1995 WUDs were recorded when the Brewers purchased their property in 2004. The 1992 CC&Rs authorized LEEHOA to levy assessments to "promote the recreation, health, safety and welfare of the Owners, and to pay costs associated with any signage, landscaping, lighting *and water thereof.*" (CP 1036 at ¶ 11, *see also* CP 1091 at ¶ 3.2 (emphasis added).) There is no support for their argument that the "water thereof" language in the 1992 CC&Rs became obsolete with the transfer of the ownership of the nine Water Systems and recording of the 1995 WUDs. (AB at 6.) First, there was no "transfer of ownership", and second, the 1995 WUD upon which the Brewers rely, provides "[t]he water system and water system bank account shall be managed by such of the parties as the parties who own the property hereinabove described mutually agree upon." (CP 1037 at ¶ 13, *see also* CP 1107 at ¶ 9.) In or about 2000, the lot owners appointed LEEHOA to manage the Water Systems. (CP 1038 at ¶ 18.)

That the lot owners agreed to have LEEHOA manage the Water Systems is also confirmed by the Board's passage of the 2001 By-Laws. They specifically state that "[t]he Board of Trustees shall appoint a Water Master to manage the water (sic) Lake Easton Estates Domestic Water system." (CP 985 at § 4.6.) As the trial court recognized, LEEHOA "came in and took over. They had the responsibility to take over, quite frankly. Their bylaws, Article III, sets forth they have the responsibility to

promote the community welfare of the owners of the lots and to do what is necessary to carry out the articles of incorporation." (CP 1845:14-17.) As stated by the trial court, the Brewers are *not* required to have LEEHOA manage Well I. But until all of the other owners of Well I mutually agree to have someone other than LEEHOA manage their water system, LEEHOA has the responsibility and legal right to ensure the Water Systems are properly maintained. (CP 937 at ¶ 8.)

G. The Trial Court Did Not Err In Granting LEEHOA's Motion for Summary Judgment Dismissing the Brewers' Claims for Negligence, Nuisance and Conversion in their Entirety.

1. The Trial Court Properly Dismissed the Brewers' Negligence Claim.

The Brewers allege that LEEHOA should be held liable for negligence to the extent that it has failed to comply with State and County codes. This argument was properly rejected by the trial court and should be affirmed on appeal.

The Brewers argue that LEEHOA has failed to enforce a 100-foot setback from each well head clear of any building ("100' setback"). But this requirement is contained in the 1995 WUDs (CP 1106 at 8), and the Brewers admit that LEEHOA is not a signatory or party to any of the 1995 WUDs. (CP 6 at ¶ 32.) Therefore, the Brewers cannot impose an obligation on LEEHOA to enforce this requirement. Moreover, the Brewers are only parties to *one* of the *nine* 1995 WUDs and have no legal standing to insist that the terms of an agreement to which they are *not* a

party be enforced by another non-party. Even if the Brewers could somehow insist that LEEHOA enforce the terms of the 1995 WUD for Well I be enforced, there is no need to do so because the 100' setback for Well I has not been encroached upon by any lot owner. Ironically, the only lot owner that has desired to pierce the 100' setback for Well I is the Brewers themselves.

Second, the 1992 CC&Rs only prohibit sources of contamination. There is no evidence that any of the buildings built within 100' of any wellhead are a source of contamination. Even if they were, the 1992 CC&Rs do not provide LEEHOA the right or opportunity to review, comment or otherwise participate in the construction of any structures located within the Development. As the Brewers point out, the 100' setback set forth in the 1995 WUDs is required under the Washington Administrative Code and the Kittitas County Code. (AB at 42). Therefore, LEEHOA is in no position to second guess the State or County which approved the building permits for any structures.

Third, there is no evidence of any contamination in Well I. Every water test of Well I since 2002 has been negative. (CP 1011.)

The Brewers' negligence claim was properly dismissed by the trial court and should be affirmed on appeal.

2. The Trial Court Properly Dismissed the Brewers' Nuisance Claim.

The Brewers assert the trial court erred in dismissing their claim of nuisance because genuine issues of material fact existed which precluded

summary judgment. This is false. The Brewers' nuisance claim failed at the trial court because they lacked any evidence to support this cause of action.

"Nuisance" is defined in RCW 7.48.120:

> Nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either annoys, injures or endangers the comfort, repose, health or safety of others, offends decency, or unlawfully interferes with, obstructs or tends to obstruct, or render dangerous for passage, any lake or navigable river, bay, stream, canal or basin, or any public park, square, street or highway; or in any way renders other persons insecure in life, or in the use of property.

The critical issue is not whether the Brewers were actually harmed, but whether LEEHOA "omitted to perform a duty" that would give rise to this cause of action. First, the 1992 CC&Rs require all lot owners to comply with building and zoning codes (CP 1093 at ¶ 4.3) and that no source of contamination be constructed within 100' of any of the nine wellheads. (CP 1096 at ¶ 6.3.) There is no evidence in the record, and no inference from any evidence, that any building within 100' of any wellhead, or any building within the Development for that matter, is a source of contamination. The Brewers admit that their wellhead has "not been encroached" (AB at 9) and, in fact, the Brewers themselves argued to Kittitas County that allowing them to build within the 100' setback would *not* be detrimental to the public welfare or neighboring properties. (CP 810.) The Kittitas County Prosecutor stated that the Brewers submitted no evidence of that being true, which was one of the reasons Kittitas County

denied their request for a variance. (*Id.*) Contrary to what was asserted by the Brewers, the Kittitas County Prosecutor never said that "building a structure within 100' of a Class B well is a danger to public health, safety and welfare and should never be permitted." (AB at 9.)

Now, after losing this argument, the Brewers take an alternate position: that any construction within 100' of any wellhead is detrimental to the public welfare. Despite this flip flop, the Brewers still fail to present any evidence of this being true.

Second, the 1992 CC&Rs require lot owners to comply with building codes. (CP 1093 at ¶ 4.3.) It is therefore reasonable for LEEHOA and its lot owners to rely on the County and State to enforce those building codes and to enforce any setback requirements that may be in effect. This type of enforcement materialized when the Brewers attempted to build within the 100' setback. LEEHOA is not responsible for overseeing the building codes, especially when the codes *are* being enforced by the County and State.

Third, the Brewers claim that LEEHOA failed to test the water quality of Well I for seven years, which supports their claim for negligence, nuisance and conversion. The Brewers' citation to CP 449-455, 778, 792-796, and 862-868, do not support this claim. Well I *was* tested every single year, and the records confirm that Well I passed all of its inspections. (CP 1011.) Furthermore, the Brewers' argument that six of the nine Water Systems have tested positive for fecal coliform is a red herring. The evidence submitted by the Brewers only shows that between

1993 and 2002 six of the nine Water Systems were contaminated at one point. (CP 763.) The Brewers did not own property in the Development during this time period and Well I has not tested positive since they bought their property in 2004. (CP 1011.) They have no claim for contamination in a water system before they even owned it, and any such claim would in any event be barred by the statute of limitations. The Brewers' reliance on a case that discusses whether the "fear of danger" can support a nuisance claim ignores the critical element at issue: Has LEEHOA omitted to perform a duty to support their claim for nuisance? The answer is: no.

Finally, WAC 246-291, which sets forth the requirements for building within a sanitary control, has exceptions. The Brewers present no evidence that those exceptions did not apply to those structures built within the 100' setbacks. The Brewers' nuisance claim was properly dismissed by the trial court.

3. The Trial Court Properly Dismissed the Brewers' Conversion Claim.

The Brewers allege that since purchasing their property, LEEHOA has collected fees for maintenance of private property and private water systems from which they receive no value of beneficial use. They claim that because the trial court ruled "the well owners shall not be subject to assessments for any other well systems", it was improper for the trial court to dismiss their claim for conversion. (AB at 3.)

This assertion is both inaccurate and very misleading. Again, it cannot be reiterated enough that the trial court ruled that the Water System owners shall not be subject to assessments for any other water system *if* the 1995 WUD is successfully challenged and/or all of the owners of the same water system mutually agree to have someone other than LEEHOA manage their water system. Until this occurs, the 1995 WUDs, the 1992 CC&Rs, and the By-Laws give LEEHOA the authority to manage the Water Systems, collect dues, and bill the lot equally for the costs associated with the managing and operating the Water Systems.

A claim for conversion requires an unwarranted interference with a right to possession of property. *See Judkins v. Sadler-Mac Ne*il, 61 Wn.2d. 1, 3, 376 P.2d 837 (1962). LEEHOA claims no ownership or possession of any of the nine Water Systems. (CP 1038 at ¶ 18.)

Interpretation of a contract is a question of law when "(1) the interpretation does not depend on the use of extrinsic evidence, or (2) one reasonable inference can be drawn from the extrinsic evidence." *Go2Net, Inc. v. C I Host, Inc.*, 115 Wn. App. 73, 60 P.3d 1245, 1251 (2003). The 1992 CC&Rs, 1990 Water Agreement, 1995 WUDs, and the By-Laws, when read together, explicitly or implicitly, authorize LEEHOA to collect assessments to manage the Water Systems and the Brewers' claim for conversion fails as a matter of law.

H. RAP 18.1 Request for Attorney's Fees.

The Brewers seek an award of attorney fees and costs pursuant to RAP 18.1, which allows a party to request reasonable attorney fees if applicable law grants a party the right to recover these fees.

The Brewers claim that RCW 64.38.050 entitles them, as the prevailing party, to recover their attorney fees. This statute, contained in the 1995 HOA Act, is directly contrary to the Brewers' argument that the 1995 HOA Act does not apply because LEEHOA does not qualify as a homeowners' association. Thus, if this court affirms the dismissal of the Brewers' lawsuit, their request for attorney fees and costs should be denied, and attorney fees and costs should be awarded to LEEHOA as the prevailing party.

V. CONCLUSION

The trial court did not err when it ruled that LEEHOA had authority to manage the Brewers' water system (Well I); when it ruled the 1992 CC&Rs are the controlling instrument for management of the Water Systems in the Development; and when it granted LEEHOA's motion for summary judgment dismissing the Brewers' claims for negligence, nuisance, and, conversion. Accordingly, this court should affirm the trial court's decisions.

RESPECTFULLY SUBMITTED this 23rd day of August, 2017.

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CERTIFICATE OF SERVICE

I, Denise Wolfard, declare as follows:

1) I am a citizen of the United States and a resident of the State of Washington. I am over the age of 18 years and not a party to the within entitled cause. I am employed by the law firm of Betts Patterson & Mines, One Convention Place, Suite 1400, 701 Pike Street, Seattle, Washington 98101-3927.

2) By the end of the business day on August 28, 2017, I caused to be served upon counsel of record at the addresses and in the manner described below, the following documents:

- **Brief of Respondents; and**
- **Certificate of Service.**

Counsel for Plaintiff Lynn and Douglas Brewer
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☑ U.S. Mail
☐ Hand Delivery
☐ Facsimile
☐ Overnight
☑ E-mail

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 28th day of August, 2017.

Denise Wolfard

BETTS, PATTERSON & MINES, P.S.

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